(22) (21)

Nos. 91-744 and 91-902

FILED
APR 6 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., PETITIONERS

v.

ROBERT P. CASEY, ET AL.

ROBERT P. CASEY, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

ALFRED R. MOLLIN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Did the court of appeals err in upholding the constitutionality of the following provisions of the Pennsylvania Abortion Control Act: (a) 18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1983 & Supp. 1991) (definition of medical emergency); (b) 18 Pa. Cons. Stat. Ann. § 3205 (Purdon 1983 & Supp. 1991) (informed consent); (c) 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983 & Supp. 1991) (parental consent); (d) 18 Pa. Cons. Stat. Ann. §§ 3207 and 3214 (Purdon 1983 & Supp. 1991) reporting requirements)?

2. Did the court of appeals err in holding 18 Pa. Cons. Stat. Ann. § 3209 (Purdon Supp. 1991) (spousal notice) unconstitutional?

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	4
Argument:	
The Pennsylvania Abortion Control Act does not violate the Constitution	5
I. Abortion regulations should be upheld if they are reasonably designed to serve a legitimate state interest	6
A. Abortion regulations should be subject to heightened scrutiny only if they implicate a fundamental right	6
B. The Pennsylvania Abortion Control Act does not implicate a fundamental right under the Due Process Clause	8
1. The Nation's history and traditions do not establish a fundamental right to abortion	9
2. The State has a compelling interest in protecting the fetus throughout pregnancy	15
II. The Pennsylvania Abortion Control Act is reasonably designed to advance legitimate state interests	19
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Akron v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983)	3, 5, 17, 20, 25
Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983)	11
Bowen v. *Kendrick*, 487 U.S. 589 (1988)	18
Bowers v. *Hardwick*, 478 U.S. 186 (1986)	7, 8, 9

Cases—Continued: Page

Burnett v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932) 9
Burnham v. *Superior Court*, 495 U.S. 604 (1990) .. 8
Califano v. *Aznavorian*, 439 U.S. 170 (1978) 7
Carey v. *Population Servs. Int'l*, 431 U.S. 678 (1977) 15
Coker v. *Georgia*, 433 U.S. 584 (1977) 14
Cox v. *Wood*, 247 U.S. 3 (1918) 14
Cruzan v. *Director*, 110 S. Ct. 2841 (1990) 8, 20
DeShaney v. *Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989) 14
Doe v. *Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974) 23
Employment Division, Dep't of Human Resources v. *Smith*, 494 U.S. 872 (1990) 18
Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 7
Geduldig v. *Aiello*, 417 U.S. 484 (1974) 26
Griffin v. *United States*, 112 S. Ct. 466 (1991) 8
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 6-7, 8
Haig v. *Agee*, 453 U.S. 280 (1981) 15
Harris v. *McRae*, 448 U.S. 297 (1980) 13, 18, 20, 22, 26
Hodgson v. *Minnesota*, 110 S. Ct. 2926 (1990) 1, 5, 22, 23, 25
Illinois v. *Gates*, 462 U.S. 213 (1983) 16
Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 14, 27
Jehovah's Witnesses v. *King County Hosp.*, 390 U.S. 598 (1968), aff'g 278 F. Supp. 488 (W.D. Wash. 1967) 18
Judgment of Feb. 25, 1975, 39 BVerfGE 1, *reprinted in* 9 J. Marshall J. Prac. & Proc. 605 (1975) 12
Kirchberg v. *Feenstra*, 450 U.S. 455 (1981) 26
Labine v. *Vincent*, 401 U.S. 532 (1971) 24, 25
Lee v. *Washington*, 390 U.S. 333 (1968) 15
Lehr v. *Robertson*, 463 U.S. 248 (1983) 24
Lindsey v. *Normet*, 405 U.S. 56 (1972) 14
Maher v. *Roe*, 432 U.S. 464 (1977) 21, 26
Marks v. *United States*, 430 U.S. 188 (1977) 3
McKeiver v. *Pennsylvania*, 403 U.S. 528 (1971) 8
Metro Broadcasting, Inc. v. *FCC*, 110 S. Ct. 2997 (1990) 5

Cases—Continued: Page

Metropolitan Life Ins. Co. v. *Ward*, 470 U.S. 869 (1985) 15
Michael H. v. *Gerald D.*, 491 U.S. 110 (1989) 7-8, 9, 12, 13, 24
Michael M. v. *Superior Court*, 450 U.S. 464 (1981) 14
Minnesota v. *Probate Court*, 309 U.S. 270 (1940) 27
Miranda v. *Arizona*, 384 U.S. 436 (1966) 16
Moore v. *East Cleveland*, 431 U.S. 494 (1977) 6, 7, 8
Morgentaler v. *Regina*, 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988) 12
Near v. *Minnesota*, 283 U.S. 697 (1931) 15-16
Ohio v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990) 19, 24
Palko v. *Connecticut*, 302 U.S. 319 (1937) 7
Patterson v. *New York*, 432 U.S. 197 (1977) 8
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 6
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) 20, 24, 28
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 (1983) 28
Poe v. *Gerstein*, 517 F.2d 787 (5th Cir. 1975), aff'd, 428 U.S. 901 (1976) 23
Poe v. *Ullman*, 367 U.S. 497 (1961) 16
Prince v. *Massachusetts*, 321 U.S. 158 (1944) 18
Reynolds v. *United States*, 98 U.S. 145 (1879) 18
Riley v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) 21
Roe v. *Wade*, 410 U.S. 113 (1973) ..... *passim*
Rust v. *Sullivan*, 111 S. Ct. 1759 (1991) 8
Schad v. *Arizona*, 111 S. Ct. 2491 (1991) 8
Scheinberg v. *Smith*, 659 F.2d 476 (5th Cir. 1981) 25
Schloendorff v. *Society of the New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914) 13
Schmerber v. *California*, 384 U.S. 757 (1966) 13-14
Selective Draft Law Cases, 245 U.S. 366 (1918) 14
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 24
Slater v. *Baker*, 2 Wils. 359, 95 Eng. 860 (K.B. 1767) 20
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 8

Cases—Continued: Page

Sosna v. *Iowa*, 419 U.S. 393 (1975) 25
Stanford v. *Kentucky*, 492 U.S. 361 (1989) 8, 11, 12
Thornburgh v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) 3, 5, 13, 17, 18, 20, 21, 27, 28
United States v. *Kozminski*, 487 U.S. 931 (1988).. 19
United States v. *O'Brien*, 391 U.S. 367 (1968)..... 11
United States v. *Salerno*, 481 U.S. 739 (1987) 19
United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 15
Vance v. *Bradley*, 440 U.S. 93 (1979) 21
Virginia v. *American Booksellers Ass'n*, 484 U.S. 383 (1988) 27
Vitek v. *Jones*, 445 U.S. 480 (1980) 13
Washington v. *Harper*, 494 U.S. 210 (1990) 13
Webster v. *Reproductive Health Care Servs.*, 492 U.S. 490 (1989) 1, 5, 6, 9, 14, 15, 17, 19, 26
Williamson v. *Lee Optical Co.*, 348 U.S. 483 (1955) 7
Winston v. *Lee*, 470 U.S. 753 (1985) 14
Wyman v. *James*, 400 U.S. 309 (1971) 28
Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) 21
Zobel v. *Williams*, 457 U.S. 55 (1982) 15

Constitution and statutes:

U.S. Const.:
Amend. I 21
Establishment Clause 18
Free Exercise Clause 18, 19
Amend. IV 14
Amend. V (Due Process Clause) 5, 6, 8, 14-15
Amend. VIII 8
Amend. X 6
Amend. XIII 19
Amend. XIV 4, 10
Equal Protection Clause 26
Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (Hyde Amendment) 2, 18

Statutes—Continued: Page

Public Health Service Act (Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.* 2, 18
Abortion Control Act, 18 Pa. Cons. Stat. Ann. (Purdon):
§§ 3201-3220 (1983 & Supp. 1991) 2
§ 3202(a) (1983) 11
§ 3202(b) (1983) 2
§ 3202(b)(4) (1983) 11
§ 3203 (Supp. 1991) 26
§ 3203(a) (1983) 2
§ 3204(c) (Supp. 1991) 2, 18
§ 3205(a)(1) (Supp. 1991) 20
§ 3205(a)(2) (1983 & Supp. 1991) 20
§ 3206(a) (1983 & Supp. 1991) 22
§ 3206(b) (1983) 22
§ 3206(c) (1983) 22
§ 3206(d) (1983) 22
§ 3206(e)-(h) (1983 & Supp. 1991) 22
§ 3207 (1983 & Supp. 1991) 27
§ 3209(a) (Supp. 1991) 23, 25
§ 3209(b) (Supp. 1991) 23
§ 3211(a) (1983 & Supp. 1991) 2
§ 3214 (Supp. 1991) 27-28
§ 3214(a) (Supp. 1991) 27, 28
Colo. Rev. Stat. Ann. § 18-6-101(1) (West 1986) 23
Lord Ellenborough's Act, 1803, 43 Geo. 3, ch. 58 10

Miscellaneous:

A. Bickel, *The Morality of Consent* (1975) 9
Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe *v.* Wade?, 15 J. Contemp. L. 131 (1989) 19
Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329 9
A. Cox, *The Court and the Constitution* (1987) 9
J. Ely, *Democracy and Distrust—A Theory of Judicial Review* (1980) 9
Ely, *The Wages of Crying Wolf: A Comment on* Roe *v.* Wade, 82 Yale L.J. 920 (1973) 16-17
Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 ..... 9, 11

Miscellaneous—Continued: Page

M. Glendon, *Abortion and Divorce in Western Law* (1987) 12
Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817 9
3 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* (2d ed. 1986) 13, 20
J. Mohr, *Abortion in America* (1978) 10, 11, 17
Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992) 10, 11
L. Tribe, *American Constitutional Law* (2d ed. 1988) 17
Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973) 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-744

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., PETITIONERS,

v.

ROBERT P. CASEY, ET AL.

No. 91-902

ROBERT P. CASEY, ET AL., PETITIONERS

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This Court granted review in order to resolve several issues regarding the constitutionality of the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act. In *Webster* v. *Reproductive Health Care Servs.*, 492 U.S. 490 (1989), and *Hodgson* v. *Minnesota*, 110 S. Ct. 2926 (1990), the United States filed briefs as an amicus

curiae in which we argued that *Roe* v. *Wade*, 410 U.S. 113 (1973), was wrongly decided and should be overruled. Moreover, Congress has enacted laws affecting abortion.[1] The United States therefore has a substantial interest in the outcome of this case.

STATEMENT

1. In 1988 and 1989, Pennsylvania amended its Abortion Control Act, 18 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983 & Supp. 1991). The purpose of the Act is to "protect hereby the life and health of the woman subject to abortion" and "the child subject to abortion," to "foster the development of standards of professional conduct in a critical area of medical practice," to "provide for development of statistical data," and to "protect the right of the minor woman voluntarily to decide to submit to abortion or to carry her child to term." *Id.* § 3203(a) (Purdon 1983); see also *id.* § 3202(b) (Purdon 1983) (legislative findings). The Act outlaws post-viability abortions and pre-viability abortions based on the fetus's sex. *Id.* § 3204(c) (Purdon Supp. 1991), § 3211(a) (Purdon 1983 & Supp. 1991). Otherwise, the Act regulates but does not ban abortion. Five such regulations are at issue here: the informed consent, informed parental consent, and spousal notification requirements; the definition of a medical emergency, which is an exception to the first three provisions; and certain reporting requirements.

2. Petitioners, five abortion clinics and one physician, brought this action three days before the 1988 amendments would have taken effect, seeking to have those amendments (and later the 1989 amendments) declared unconstitutional. The district court entered preliminary injunctions against the 1988 and 1989 amendments. After

---

[1] *E.g.*, Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (the Hyde Amendment); Public Health Service Act (the Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.*

a bench trial, relying on *Roe* v. *Wade*, *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (*Akron I*), and *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the court held unconstitutional the five provisions noted above and permanently enjoined their enforcement. 91-744 Pet. App. (Pet. App.) 104a-287a.

3. The court of appeals, by a divided vote, affirmed in part and reversed in part. Pet. App. 1a-103a. At the outset, the court addressed the correct standard of review for abortion regulations. Relying on *Marks* v. *United States*, 430 U.S. 188 (1977), the court concluded that when this Court issues a judgment without a majority opinion, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." Pet. App. 20a, 15a-24a. Applying that approach to this Court's decisions, the court held that the strict scrutiny standard of *Roe*, *Akron I*, and *Thornburgh* was no longer applicable after *Webster* and *Hodgson*. Instead, the court determined, the undue burden standard adopted by Justice O'Connor now constituted the governing rule. Pet. App. 24a-30a.

The Third Circuit then applied the undue burden standard to the Pennsylvania Act. The court unanimously held that the definition of medical emergency included conditions posing a significant risk of death or serious injury to a woman, and that the informed consent, informed parental consent, and reporting requirements did not unduly burden a woman's right to an abortion. Pet. App. 33a-60a, 75a-85a. By contrast, a majority of the court held that the spousal notification provision was unduly burdensome and that the State lacked a compelling interest in ensuring such notification. Pet. App. 60a-74a. Judge Alito dissented from that portion of the majority's decision. Pet. App. 86a-103a.

SUMMARY OF ARGUMENT

I. Under this Court's decisions, a liberty interest is "fundamental" and thus deserves heightened protection only if our Nation's history and traditions have protected that interest from state restriction. Those sources do not establish a fundamental right to abortion. Abortion after quickening was a crime at common law; the first English abortion statute outlawed abortions throughout pregnancy; state laws condemning or restricting abortion were common when the Fourteenth Amendment was ratified; and 21 of those laws were still in existence in 1973. Thus, strict scrutiny is inappropriate. The correct standard of review is the one endorsed by the *Webster* plurality. In any event, a State has a compelling interest in protecting fetal life throughout pregnancy.

II. The challenged provisions of the Pennsylvania Act are reasonably designed to advance legitimate state interests. The informed consent and waiting period requirements ensure that a woman knows the relevant facts and can reflect on them before making a final decision. The informed parental consent requirement enables parents to make important decisions affecting their child. The spousal notification requirement can help protect the life of a fetus, the integrity of the family unit, and the husband's interests in procreation within marriage and the potential life of his unborn child. The definition of medical emergency includes those conditions that put a woman's life or health at significant risk. The reporting rules help in enforcing the ban on abortion of viable fetuses (except to protect a mother's life or health), in advancing medical knowledge, and in informing the public about the use of state tax dollars.

ARGUMENT

THE PENNSYLVANIA ABORTION CONTROL ACT DOES NOT VIOLATE THE CONSTITUTION

In *Roe* v. *Wade*, a divided Court held that a woman has a fundamental right to an abortion; the Court also adopted a complex trimester framework to determine whether and how a State may regulate abortion. Since then, a majority of the Members of this Court has expressed the view that *Roe* and succeeding cases should be limited or overruled. See *Webster*, 492 U.S. at 517-521 (plurality opinion of Rehnquist, C.J., joined by White & Kennedy, JJ.); *id.* at 532 (opinion of Scalia, J.); *Hodgson*, 110 S. Ct. at 2984 (Scalia, J., concurring); *Thornburgh*, 476 U.S. at 786-797 (White, J., dissenting, joined by Rehnquist, J.); *Akron I*, 462 U.S. at 453-459 (O'Connor, J., dissenting, joined by White & Rehnquist, JJ.). At the same time, none of the opinions in recent abortion cases commanded a majority. The result is that considerable uncertainty now prevails with respect to the proper standard of review applicable when legislation affecting abortion is challenged under the Due Process Clause. The Third Circuit's opinion in this case illustrates this uncertainty.

Ascertaining the correct standard of review is not only the threshold issue, but also a critical one. Here, as elsewhere, the question of the correct standard that the courts should employ is not merely "a lawyer's quibble over words," but "establishes whether and when the Court and Constitution allow the Government to" regulate a woman's abortion decision. *Metro Broadcasting, Inc.* v. *FCC*, 110 S. Ct. 2997, 3033 (1990) (O'Connor, J., dissenting). This issue is one in need of clarification if the legislatures, lower courts, and litigants are to have guidance in this difficult area. We believe that the correct standard was the one articulated by the *Webster* plurality: Is a regulation reasonably designed to serve a legitimate state inter-

est? That standard should be applied to the questions in this case and to abortion regulations generally.[2]

I. ABORTION REGULATIONS SHOULD BE UPHELD IF THEY ARE REASONABLY DESIGNED TO SERVE A LEGITIMATE STATE INTEREST

A. Abortion Regulations Should Be Subject To Heightened Scrutiny Only If They Implicate A Fundamental Right

The ultimate source for constitutional rights is the text of the Constitution. That text, of course, is silent with respect to abortion; the Constitution leaves this matter to the States, since only the States possess a general, regulatory police power. See *Roe*, 410 U.S. at 177 (Rehnquist, J., dissenting) ("the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter"); U.S. Const. Amend. X. The "right to an abortion" was judicially recognized in *Roe* as "derived from the Due Process Clause," *Webster*, 492 U.S. at 521 (plurality opinion); *Roe*, 410 U.S. at 153. By its terms, however, the Due Process Clause seeks to ensure that the government affords a person the process she is due before it attempts to deprive her of life, liberty, or property. The text of the Clause therefore focuses on procedure, not substance.

This Court's decisions nevertheless hold that the Clause provides a measure of substantive protection to certain liberty interests. See, *e.g.*, *Moore* v. *East Cleveland*, 431 U.S. 494 (1977); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Griswold* v. *Connecticut*, 381 U.S. 479, 501

---

[2] Petitioners note, Pet. Br. 36-37, that we urged this Court to adopt an "undue burden" analysis in *Akron I*, but criticized and abandoned that standard in *Webster* and *Hodgson*. We adhere to our views as expressed in the latter two cases. In our view, the undue burden standard begs the question at issue (namely, whether there is a fundamental right to abortion) and does not provide a meaningful guide for assessing the weight of the competing interests.

(1965) (Harlan, J., concurring in the judgment). At the same time, the Court has been cautious in identifying such rights, recognizing that once the courts venture beyond the "core textual meaning" of "liberty" as freedom from bodily restraint, the imputation of substance to that concept is a "treacherous" undertaking. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 121 (1989) (plurality opinion) (citation omitted). Accordingly, the Court has recognized that it "is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers* v. *Hardwick*, 478 U.S. 186, 194 (1986).

The general standard of review in assessing a substantive due process claim is highly deferential to legislative judgments. As a rule, a state or federal law that trenches on an individual's liberty interest will be upheld as long as it is rationally related to a legitimate governmental interest. See, *e.g.*, *Califano* v. *Aznavorian*, 439 U.S. 170, 176-178 (1978); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). In some sensitive areas, however, the Court has gone further and held that certain liberty interests rise to the level of "fundamental rights" and are subject to more exacting scrutiny. *Michael H.*, 491 U.S. at 122 (plurality opinion). Where that is the case, the State may restrict such a liberty interest only through means that are narrowly tailored to serve a compelling state interest. *Roe* v. *Wade*, 410 U.S. at 155-156 (collecting cases). Accordingly, the applicable standard of review in substantive due process cases is principally a function of the methodology used for identifying what rights are "fundamental."

This Court has held that a liberty interest will be deemed fundamental if it is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), is "deeply rooted in this Nation's history and tradition," *Moore*, 431 U.S. at 503 (plurality opinion), or is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Michael H.*, 491

U.S. at 122 (plurality opinion) (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934)). See *Bowers*, 478 U.S. at 192-194. The precise formulation may vary, but the governing methodology rests on the Nation's history and traditions. *E.g.*, *Burnham* v. *Superior Court*, 495 U.S. 604, 608-619 (1990) (plurality opinion); *Michael H.*, 491 U.S. at 122-130 (plurality opinion); *Bowers*, 478 U.S. at 192-194; *Moore*, 431 U.S. at 504 n.12 (plurality opinion); *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in the judgment). See *Cruzan* v. *Director*, 110 S. Ct. 2841, 2846-2851 & n.7 (1990).[3] By so limiting fundamental rights, the Court has sought, in the words of the *Michael H.* plurality, to "prevent future generations from lightly casting aside important traditional values," while assuring that the Due Process Clause does not become a license "to invent new ones." 491 U.S. at 122 n.2. See *Moore*, 431 U.S. at 504 n.12 (plurality opinion).

B. The Pennsylvania Abortion Control Act Does Not Implicate A Fundamental Right Under The Due Process Clause

Petitioners' principal submission is that the Court should reaffirm the fundamental right to abortion identified in *Roe*. As we explained in our briefs in *Akron I*, *Thornburgh*, *Webster*, *Hodgson*, and *Rust* v. *Sullivan*, 111 S. Ct. 1759 (1991), *Roe* v. *Wade* was wrongly decided and should be overruled. We strongly adhere to that position in this case.[4] But regardless of whether this

---

[3] That approach is consistent with this Court's procedural due process and Eighth Amendment decisions. In those areas, too, this Court has insisted that, at a minimum, history and tradition must inform the otherwise broad and general constitutional text. See, *e.g.*, *Griffin* v. *United States*, 112 S. Ct. 466, 469-470 (1991); *Schad* v. *Arizona*, 111 S. Ct. 2491, 2500-2503 (1991) (plurality opinion); *id.* at 2505-2507 (opinion of Scalia, J.); *Stanford* v. *Kentucky*, 492 U.S. 361, 368-370 (1989); *Patterson* v. *New York*, 432 U.S. 197, 202 (1977); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971) (plurality opinion).

[4] As we explained in our *Webster* brief (at 9-10), stare decisis considerations do not preclude reconsidering and overruling *Roe*.

case requires reconsideration of *Roe*'s actual holding, see *Webster*, 492 U.S. at 521 (plurality opinion), the Court should clarify the standard of review of abortion regulation and, in so doing, make clear that the liberty interest recognized in *Webster* does not rise to the exceptional level of a fundamental right.

1. *The Nation's history and traditions do not establish a fundamental right to abortion*

In *Webster*, a plurality of the Court determined that a woman's interest in having an abortion is a form of liberty protected by due process against arbitrary deprivation by the State. 492 U.S. at 520. Under the traditional means used by this Court to identify fundamental rights, however, no credible foundation exists for the claim that a woman enjoys a fundamental right to abortion.[5] That conclusion follows whether the inquiry is framed broadly, in terms of privacy or reproductive choice, or narrowly, in terms of abortion. Compare *Michael H.*, 491 U.S. at 127-128 n.6 (opinion of Scalia, J.), with *id.* at 132 (O'Connor, J., concurring in part).

If "[n]either the length of time a majority has held its convictions [n]or the passions with which it defends them can withdraw legislation from this Court's scrutiny," *Bowers*, 478 U.S. at 210 (Blackmun, J., dissenting), neither factor should immunize one of this Court's constitutional rulings from re-examination, because in such cases "correction through legislative action is practically impossible." *Burnett* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

[5] That judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, A. Bickel, *The Morality of Consent* 27-29 (1975); Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Cox, *The Court and the Constitution* 322-338 (1987); J. Ely, *Democracy and Distrust—A Theory of Judicial Review* 2-3, 247-248 n.52 (1980); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973).

To examine this proposition, we turn to explore the legal history and traditions of the American people to discern the basis and nature of any such right.

a. It is beyond dispute that abortion after "quickening" was an offense at common law.[6] The first English abortion law, Lord Ellenborough's Act, 1803, 43 Geo. 3, ch. 58, outlawed abortion throughout pregnancy; it distinguished pre- from post-quickening abortions only to fix the severity of punishment. Early in our history, this Nation embraced the common law. In 1821, however, States began to enact laws condemning or restricting abortion. By the time the Fourteenth Amendment was ratified, such legislation was commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. The Reconstruction Era witnessed "the most important burst of anti-abortion legislation in the nation's history." J. Mohr, *Abortion in America* 200 (1978).[7] By the turn of the century, after "the passage of unambiguous anti-abortion laws in most of the states that had not already acted during the previous twenty years," the country had completed the transition from a Nation that followed the common law rule

---

[6] The historical materials are discussed in *Roe*, 410 U.S. at 132-141; *id.* at 174-177 & nn.1-2 (Rehnquist, J., dissenting); J. Mohr, *Abortion in America* (1978); Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 281-282 (1992); Amicus Br. of the American Academy of Medical Ethics; Amicus Br. of Certain American State Legislators.

[7] "At least 40 anti-abortion statutes of various kinds were placed on the state and territorial lawbooks during that period [between 1860 and 1880]; over 30 in the years from 1866 through 1877 alone. Some 13 jurisdictions formally outlawed abortion for the first time, and at least 21 states revised their already existing statutes on the subject. More significantly, most of the legislation passed between 1860 and 1880 explicitly accepted the regulars' [*i.e.*, regular physicians'] assertions that the interruption of gestation at any point in a pregnancy should be a crime and that the state itself should try actively to restrict the practice of abortion." J. Mohr, *supra*, at 200.

outlawing post-quickening abortion to "a nation where abortion was legally and officially proscribed." *Id.* at 226. "Every state in the Union had an anti-abortion law of some kind on its books by 1900 except Kentucky, where the state courts outlawed the practice anyway." *Id.* at 229-230. With minor refinements and adjustments, those statutes, which reflected "a basic legislative consensus," remained unchanged until the 1960's. *Id.* at 229. And 21 of those laws were in effect in 1973 when *Roe* was decided, even after a decade of efforts at liberalization.[8]

In view of this historical record, it cannot persuasively be argued that the interest in having an abortion is so deeply rooted in our history as to be deemed "fundamental." The record in favor of the right to an abortion is no stronger than the record in *Michael H.*, where the court found no fundamental right to visitation privileges by adulterous fathers, or in *Bowers*, where the Court found no fundamental right to engage in homosexual sodomy. Cf. *Stanford* v. *Kentucky*, 492 U.S. 361, 370-373 (1989) (no consensus against execution of 16-year-olds when a majority of the States with capital punishment

---

[8] Amici 250 Historians contend that laws banning abortion were originally adopted for various ignoble reasons, not to protect life in the womb. 250 Historians Br. 15-26. That claim is overstated, J. Mohr, *supra*, 35-36, 165, 200; Siegel, 44 Stan. L. Rev. at 282, but it is irrelevant in any event. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968), and that "the insufficiency of the original motivation does not diminish other interests that the restriction may now serve," *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983); Epstein, 1973 Sup. Ct. Rev. at 168 n.34. Pennsylvania "places a supreme value upon protecting human life," including prenatal life, 18 Pa. Cons. Stat. Ann. § 3202(b)(4) (Purdon 1983), and the purpose of this Act is to "protect hereby the life and health of the woman subject to abortion" and "the child subject to abortion," *id.* § 3202(a) (Purdon 1983). Just as the widespread use of controlled substances does not render the drug laws unconstitutional, so, too, the prevalance of illegal abortions does not undermine laws outlawing or restricting abortion.

allows them to be executed). In short, this Nation's history rebuts any claim that the right to obtain an abortion is fundamental, since that history does not "exclude * * * a societal tradition of enacting laws *denying* that interest." *Michael H.*, 491 U.S. at 122 n.2 (opinion of Scalia, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ.).[9]

---

[9] The prevalence of bans or restrictions on abortion prior to *Roe* was "not merely an historical accident." *Stanford*, 492 U.S. at 369 n.1 (citation omitted). After studying the abortion laws of 20 Western countries, a leading comparative law scholar reported that "we have less regulation of abortion in the interest of the fetus than any other Western nation," and "to a greater extent than in any other country, our courts have shut down the legislative process of bargaining, education, and persuasion on the abortion issue." M. Glendon, *Abortion and Divorce in Western Law* 2 (1987). Two of those nations (Belgium and Ireland) have blanket prohibitions against abortion in their criminal law, subject only to the defense of necessity. Four countries (Canada, Portugal, Spain, and Switzerland) allow abortion only early in pregnancy and only in restricted instances, such as if there is a serious danger to the pregnant woman's health, a likelihood of serious disease or defect in the fetus, or the pregnancy resulted from rape or incest. Eight countries (Great Britain, Finland, France, West Germany, Iceland, Italy, Luxembourg, and the Netherlands) permit abortion in early pregnancy in a wider variety of circumstances that pose a particular hardship for a pregnant woman. Five nations (Austria, Denmark, Greece, Norway, and Sweden) allow elective abortions early in pregnancy, and strictly limit abortions thereafter. Only the United States permits elective abortion until viability. *Id.* at 13-15 & Table 1, 145-154. Indeed, Eastern European nations and the former Soviet Union had greater restrictions on abortion than this country does. *Id.* at 23-24. Thus, the fact that the regime created by *Roe* is so out of step with these judgments suggests that it is *Roe*, not the pre-*Roe* state of our law, that is "an historical accident."

After the publication of Professor Glendon's book, the Canadian Supreme Court struck down its abortion law on grounds similar to those stated in *Roe*. *Morgentaler* v. *Regina*, 1 S.C.R. 30, 44 D.L.R.4th 385 (1988). The West German constitutional court, by contrast, had earlier struck down a law liberalizing access to abortion on the grounds that " 'life developing within the womb' is constitutionally protected." *Judgment of Feb. 25, 1975*, 39 BVerfGE 1 (quoted in M. Glendon, *supra*, at 26). See 9 J. Marshall J. Prac. & Proc. 605 (1975) (reprinting decision).

b. Petitioners argue that "compelled continuation of a pregnancy infringes on a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm" and that abortion restrictions deny women "the right to make autonomous decisions about reproduction and family planning." Pet. Br. 24, 26. *Roe* made a similar point. 410 U.S. at 153.[10]

---

[10] *Roe* did not seek to ground a right to abortion in the text of the Constitution or this Nation's history and tradition. Instead, *Roe* fashioned the "fundamental right" to abortion by reference to several decisions of this Court. *Roe* described those decisions as recognizing a "guarantee of personal privacy," which "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." 410 U.S. at 152-153 (citations omitted). "This right to privacy," *Roe* declared, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153.

That line of reasoning, with all respect, is deeply flawed. Even if this Court's pre-*Roe* decisions have a common denominator, it is not a highly abstract right to "privacy," but a recognition of the importance of the family. Cf. *Michael H.*, 491 U.S. at 123 (plurality opinion). Even if those cases have "some extension" to "activities relating to" the family, abortion is "inherently different" from activities such as the use of contraceptives. Abortion, after all, "involves the purposeful termination of potential life." *Harris* v. *McRae*, 448 U.S. 297, 325 (1980); see generally *Thornburgh*, 476 U.S. at 792 n.2 (White, J., dissenting). For that reason, *Roe* itself realized that a "pregnant woman cannot be isolated in her privacy." 410 U.S. at 159. In sum, *Roe* derived a right to abortion from pre-*Roe* cases only by creating an artificial common denominator while denying what makes abortion unique.

By contrast, a law *mandating* abortions would pose a starkly different issue. At common law, a competent adult had a right to refuse medical care, and involuntary treatment was a battery absent consent or an emergency. *Schloendorff* v. *Society of the New York Hosp.*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (Cardozo, J.); 3 F. Harper, F. James, Jr. & O. Gray, *The Law of Torts* § 17.1 (2d ed. 1986). Relying on that tradition, the Court has held that a competent adult has a liberty interest protected by due process in refusing unwanted, state-administered medical care. *Washington* v. *Harper*, 494 U.S. 210, 229 (1990); *Vitek* v. *Jones*, 445 U.S. 480, 494 (1980). Moreover, a compelled intrusion into a person's body is a "search" under the Fourth Amendment, *Schmer-*

We readily agree that pregnancy (like abortion) entails "profound physical, emotional, and psychological consequences." *Michael M.* v. *Superior Court*, 450 U.S. 464, 471 (1981) (plurality opinion). But those burdens, albeit substantial, do not themselves give rise to a fundamental right. As this Court has recognized, governmental refusal to fund abortions can be quite burdensome, yet the Constitution does not guarantee a woman the right to such funds. And that is so even if the State funds childbirth expenses. *Webster*, 492 U.S. at 507-511. The refusal to supply other forms of government assistance can prove harmful, yet the Constitution does not require a State to intervene to prevent harm from befalling a person. *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (police protection); *Lindsey* v. *Normet*, 405 U.S. 56 (1972) (shelter). If risk of physical or psychological harm were sufficient to create a constitutional right, a person would arguably have a right to avoid vaccinations or military service. But there is no such right. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905); *Selective Draft Law Cases*, 245 U.S. 366 (1918); *Cox* v. *Wood*, 247 U.S. 3 (1918). In sum, risk of harm, standing alone, does not give rise to a constitutional right.

Nor is this conclusion altered by the fact that abortion is a controversy "of a 'sensitive and emotional nature,' generating heated public debate and controversy, 'with vigorous opposing views' and 'deeply and seemingly absolute convictions.'" New York *et al.* Br. 11 (quoting *Roe*, 410 U.S. at 116). Other subjects, such as capital punishment, likewise evoke strong emotions and inspire heated debate. Yet the Constitution leaves such questions in the main to the political process to decide.[11] In short, the Due

---

ber v. *California*, 384 U.S. 757, 767-768 (1966), and the Fourth Amendment prohibits as unreasonable certain forcible intrusions into a person's body, *Winston* v. *Lee*, 470 U.S. 753 (1985).

[11] The Court has, of course, established limits in that regard. See, *e.g.*, *Coker* v. *Georgia*, 433 U.S. 584 (1977). But within those

Process Clause does not remove issues from the political process and put them before the judiciary for resolution because they are difficult and divisive.

We believe that the proper inquiry in reviewing an abortion regulation is whether the regulation is reasonably designed to advance a legitimate state interest, as a plurality of this Court articulated in *Webster*. 492 U.S. at 520. That standard of review is deferential, but not toothless. Indeed, this Court has held laws invalid under such a standard. Compare, *e.g.*, *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *Zobel* v. *Williams*, 457 U.S. 55 (1982); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528 (1973). No reason exists to assume that courts will abdicate their responsibility to ensure that abortion regulations pass muster under that standard. Legislatures under that constitutional regime will not be able arbitrarily or unreasonably to constrain a woman's liberty interest.

2. *The State has a compelling interest in protecting the fetus throughout pregnancy*

Even if the Court's pre-*Roe* decisions could be said to create a right of "privacy" or to "accomplish or prevent conception," *Carey* v. *Population Servs. Int'l*, 431 U.S. 678, 685 (1977), that conclusion would not end the inquiry. The Court's decisions make clear that a State can limit or even forbid conduct that is otherwise entitled to constitutional protection if the State acts precisely to vindicate a compelling interest. See, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 308-309 (1981) (the government may revoke the passport of a person who wishes to travel in order to disclose intelligence operations and the names of intelligence personnel); *Lee* v. *Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (the government may take threats and tensions from prison racial strife into account for the purpose of maintaining security and order in prison); *Near* v. *Minnesota*, 283

---

limits, the policy question of using capital punishment is one entrusted to the political processes in a democratic society.

U.S. 697, 716 (1931) (dictum that military needs justify a prior restraint on the disclosure of the sailing date of troop ships). That principle is as applicable in this context as in any other, because, as Justice Harlan once noted, "[t]he right of privacy most manifestly is not an absolute." *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting). The protection of innocent human life—in or out of the womb—is certainly the most compelling interest that a State can advance. See *Illinois* v. *Gates*, 462 U.S. 213, 237 (1983) ("[t]he most basic function of any government" is "to provide for the security of the individual and of his property") (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting)). In our view, a State's interest in protecting fetal life throughout pregnancy, as a general matter, outweighs a woman's liberty interest in an abortion. The State's interest in prenatal life is a wholly legitimate and entirely adequate basis for restricting the right to abortion derived in *Roe*.

Central to *Roe* was the conclusion that the State lacks a compelling interest in preserving fetal life throughout pregnancy. *Roe* noted that a woman's right to terminate a fetus "is not unqualified and must be considered against important state interests" in "safeguarding health, in maintaining medical standards, and in protecting potential life." 410 U.S. at 154. But *Roe* stated that the weight of those interests is not uniform from conception to birth; instead, they "grow[] in substantiality as the woman approaches term." *Id.* at 162-163. Particularly critical in this regard was *Roe*'s conclusion that a State's "important and legitimate interest in potential life" is not "compelling," *i.e.*, sufficiently weighty to overcome the fundamental right to abortion, until the fetus has reached viability, since only then is the fetus capable of "meaningful life outside the mother's womb." *Id.* at 163.

The proposition that a State's interest in protecting life in the womb is compelling only at viability "seems to mistake a definition for a syllogism." Ely, *The Wages*

of Crying Wolf: A Comment on Roe *v.* Wade, 82 Yale L.J. 920, 924 (1973).[12] "The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward." *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting). Even if the importance of a State's interest in protecting the fetus parallels the fetus's development, it does not follow that the State's interest in this regard is not *compelling* throughout a pregnancy. An interest may be sufficiently weighty to be "compelling" in the constitutional sense even if it later assumes still greater urgency. Accordingly, since "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward," *Akron I*, 462 U.S. at 461 (O'Connor, J., dissenting), the State's interest in protecting prenatal life "if compelling after viability, is equally compelling before viability," *Webster*, 492 U.S. at 519 (plurality opinion); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

Roe itself recognized that laws infringing on a fundamental right are not automatically invalid; they survive strict scrutiny if they are "narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155. Accordingly, because the State's interest in protecting prenatal life is compelling throughout pregnancy,

---

[12] See J. Mohr, *supra*, at 165 ("Most [19th century] physicians considered abortion a crime because of the inherent difficulties of determining any point at which a steadily developing embryo became somehow more alive than it had been the moment before. Furthermore, they objected strongly to snuffing out life in the making."); see also *id.* at 35-36, 200; L. Tribe, *American Constitutional Law* 1349 (2d ed. 1988) ("nothing in [*Roe*] provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability, particularly when a legislative majority chooses to regard the fetus as a human being from the moment of conception and perhaps even when it does not") (footnotes omitted).

we believe that regulations furthering that interest are lawful throughout pregnancy.[13]

---

[13] Petitioners may even agree with us to some extent. The Act prohibits pre-viability abortions based on the sex of the fetus. 18 Pa. Cons. Stat. Ann. § 3204(c) (Purdon Supp. 1991). While petitioners ask the Court to reaffirm *Roe*, which bars a State from outlawing previability abortions, petitioners did not contend in the courts below, and they do not argue in this Court, that this provision is unconstitutional. It is not difficult to understand why. The prospect that a woman would terminate life in the womb merely because it is a boy or a girl surely should be so utterly odious to every member of "a free, egalitarian, and democratic society" like ours, *Thornburgh*, 476 U.S. at 793 (White, J., dissenting), that any such abortion would be properly subject to universal condemnation. At the very least, no one could seriously claim that the Constitution offers the remotest protection for such a macabre act. Yet, if a State has a compelling interest in forbidding gender-selection abortions, the *Roe* trimester framework cannot survive intact. And if the State has a compelling interest in prohibiting abortions for that reason, it may fairly be asked why the State lacks a similar compelling interest in outlawing abortions for other reasons. A State which believes that a child in the womb should not be destroyed simply because it is a boy or a girl should also be free to protect that life if it is the second (or third, etc.) child to be born, or if the pregnancy occurred despite the use of contraceptives.

Petitioners contend that "the right to abortion may be grounded" in constitutional rights other than due process. Pet. Br. 19 n.27. In our view, those claims are meritless. Indeed, the ceaseless quest for a textual basis for the constitutional right to abortion only underscores the lack of any such support. See, *e.g.*, *Harris* v. *McRae*, 448 U.S. at 319-320 (rejecting Establishment Clause challenge to Hyde Amendment); *Bowen* v. *Kendrick*, 487 U.S. 589 (1988) (same, Public Health Service Act (the Adolescent Family Life Act of 1981), 42 U.S.C. 300z *et seq.*); *Employment Division, Dep't of Human Resources* v. *Smith*, 494 U.S. 872, 879-890 (1990) (Free Exercise Clause does not invalidate neutral laws directed at secular subjects; rejecting Free Exercise challenge to statute banning drug use); *Reynolds* v. *United States*, 98 U.S. 145 (1879) (same, laws banning polygamy); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (same, law banning child labor, as applied to distribution of religious pamphlets); *Jehovah's Witnesses* v. *King County Hosp.*, 390 U.S. 598 (1968), aff'g 278 F. Supp. 488 (W.D. Wash. 1967) (upholding life-saving transfusion for a minor child over parents'

II. THE PENNSYLVANIA ABORTION CONTROL ACT IS REASONABLY DESIGNED TO ADVANCE LEGITIMATE STATE INTERESTS

Petitioners claim that the Act is unconstitutional under any standard of review. Pet. Br. 40-61. In so arguing, petitioners and amici (*e.g.*, ACOG Br. 17-20; American Psychological Ass'n Br.; City of New York *et al.* Br.; NAACP Legal Defense and Educ. Fund *et al.* Br.; Pennsylvania Coalition Against Domestic Violence *et al.* Br.) rely heavily on the burden that could befall some women from provisions such as the spousal notification requirement. Yet, as the court of appeals noted, petitioners brought a facial constitutional challenge to the statute, not an as-applied challenge. Pet. App. 5a, 41a. Thus, the governing legal standard is exacting: Petitioners must prove that the statute cannot be constitutionally applied to *anyone*. See, *e.g.*, *Ohio* v. *Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-2981 (1990) (*Akron II*); *United States* v. *Salerno*, 481 U.S. 739, 745 (1987); *Webster*, 492 U.S. at 524 (O'Connor, J., concurring). This they cannot do.[14]

Informed consent. Under the Pennsylvania statute, a woman must be given medical and other information by a physician or his agent, and she must wait 24 hours before consenting to an abortion.[15] Those provisions are valid.

Free Exercise claim; relying on *Prince*); *United States* v. *Kozminski*, 487 U.S. 931, 944 (1988) (Thirteenth Amendment does not apply to established common law cases, such as parents' right to custody of their children); U.S. Brief in *Bray* v. *Alexandria Women's Health Clinic*, No. 90-985 (opposition to abortion is not gender discrimination) (a copy has been supplied to the parties' counsel); see generally Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of* Roe v. Wade?, 15 J. Contemp. L. 131 (1989).

[14] The majority in *Akron I* and *Thornburgh* struck down statutory requirements similar to those here. The *Webster* plurality, however, explained that many of the rules adopted in *Roe* and later cases would not be of "constitutional import" once *Roe*'s trimester framework is abandoned. 492 U.S. at 518 n.15.

[15] A referring or performing physician must inform a woman about (i) the nature of the procedure and risks and alternatives

The State has a legitimate interest in ensuring that a woman's decision to have an abortion is an informed one. *Thornburgh*, 476 U.S. at 760; *Akron I*, 462 U.S. at 443; *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67 (1976).[16] Accurate information about the abortion procedure and its risks and alternatives is related to maternal health and a State's legitimate purpose in requiring informed consent. *Akron I*, 462 U.S. at 446. An accurate description of the gestational age of the fetus and the risks involved in carrying a child to term furthers those interests and the State's concern for potential life. See *Thornburgh*, 476 U.S. at 798-804 (White, J., dissenting); *id.* at 830-831 (O'Connor, J., dissenting).[17] Likewise, the State's interest in preserving potential life is rationally served by informing women that medical assistance benefits and paternal child support may be obtainable, and by making available accurate information about the

---

that a reasonable patient would find material; (ii) the fetus's probable gestational age; and (iii) the medical risks involved in carrying a pregnancy to term. 18 Pa. Cons. Stat. Ann. § 3205(a)(1) (Purdon Supp. 1991). A physician or a qualified agent also must tell a woman that (i) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; (ii) the child's father is liable for child support; and (iii) the state health department publishes free materials describing the fetus at different stages and listing abortion alternatives. *Id.* § 3205(a)(2) (Purdon 1983 & Supp. 1991). A 24-hour waiting period follows.

[16] At common law and today, a physician must obtain patients' consent to the contemplated scope of an operation without misleading them about its nature or probable consequences, and must inform patients about the risks posed by available alternative treatments. See, *e.g.*, *Cruzan*, 110 S. Ct. at 2846-2847; *Slater* v. *Baker*, 2 Wils. 359, 95 Eng. Rep. 860 (K.B. 1767); 3 F. Harper, F. James, Jr. & O. Gray, *supra*, § 17.1.

[17] Petitioners' claim that non-physician counselors can provide the same information is beside the point. As the court of appeals observed, it was reasonable for the State to conclude that disclosure by physicians will be more effective than delegation of that task to others. Pet. App. 47a-48a.

process of fetal growth and alternatives to abortion. *Id.* at 831 (O'Connor, J., dissenting).

The fact that some information may be of little or no use to some recipients, Pet. App. 177a-180a, does not cast doubt on the validity of the Act. Where, as here, no fundamental right is at stake, government may regulate conduct in an overinclusive manner, as long as it does so rationally. *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979). A State's belief that its interests are better served with an informed consent provision than without one is, in our view, entirely rational.

It is no argument that the disclosure of accurate information might persuade some women not to have an abortion. Encouraging childbirth is a legitimate governmental objective. *Harris* v. *McRae*, 448 U.S. 297, 322-323 (1980); *Maher* v. *Roe*, 432 U.S. 464, 478-479 (1977). *Roe* did not purport to impress on the Constitution the proposition that abortion is a public good. *Thornburgh*, 476 U.S. at 797 (White, J., dissenting). Instead, *Roe* professed agnosticism on the question when life begins and declined to debate the morality of abortion. 410 U.S. at 116-117, 159-162. Thus, the fact that the informed consent provision may dissuade some women from having an abortion does not undermine its validity.[18]

Lastly, the Act's 24-hour waiting period readily passes muster. A waiting period provides time for reflection and reconsideration, furthering a State's interests in informed consent and protecting fetal life. A mandatory

---

[18] Nor do the informed consent provisions violate the First Amendment rights of physicians or counselors. States are free to require professionals to include accurate and reasonably material information in their commercial speech directed toward prospective clients. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 650-651 (1985). Truthful and relevant information about risks, alternatives, and medical and financial facts is not the kind of "prescribe[d] * * * orthodox[y] in politics, nationalism, religion, or other matters of opinion" that violates the First Amendment's protection of commercial speech. *Id.* at 651; cf. *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796 n.9 (1988).

waiting period burdens women seeking abortions, but the State is constitutionally at liberty to weigh the competing concerns and to strike what it sees as an appropriate balance. The abortion decision, once implemented, is an irrevocable one, and the unique psychological consequences of that singular act will remain with a woman (and her spouse or partner) throughout their lives. Whatever the wisdom of the State's decision, it is clearly a rational one. See *Harris* v. *McRae*, 448 U.S. at 326.

Informed parental consent. An unemancipated or incompetent minor must give her informed consent and obtain that of a parent or guardian before she can obtain an abortion. 18 Pa. Cons. Stat. Ann. § 3206(a) (Purdon 1983 & Supp. 1991).[19] Alternatively, a minor can obtain an abortion if a state court finds that she is mature, is capable of giving informed consent, and gives such consent, or that an abortion is in her best interests. *Id.* § 3206(c) and (d) (Purdon 1983); see *id.* § 3206(e)-(h) (Purdon 1983 & Supp. 1991) (bypass procedures). Those provisions are valid, too.

In our view, a minor has no fundamental right to an abortion without parental consent.[20] In addition, a State has a strong and legitimate interest in involving parents in matters affecting their children's well-being, including abortion. See, *e.g.*, *Hodgson*, 110 S. Ct. at 2948 (opinion of Stevens, J.); *id.* at 2950-2951 (opinion of

---

[19] Consent of the child's guardian(s) is sufficient if both parents are dead or otherwise unavailable to the physician in a reasonable time and manner. Consent of a custodial parent is sufficient if the child's parents are divorced. Consent of an adult standing in loco parentis is sufficient if neither a parent nor a guardian is available to the physician in a reasonable time and manner. 18 Pa. Cons. Stat. Ann. § 3206(b) (Purdon 1983). In the case of pregnancy due to incest by the child's father, the minor need obtain consent only from her mother. 18 Pa. Cons. Stat. Ann. § 3206(a) (Purdon 1983 & Supp. 1991).

[20] Our position in this regard is set forth in our amicus brief in *Hodgson* v. *Minnesota*, Nos. 88-1125 & 88-1309, a copy of which has been provided to the parties' counsel.

O'Connor, J.); *id.* at 2970 (opinion of Kennedy, J.). Parental consent laws reasonably advance that interest. Furthermore, if the informed consent provision is valid, the informed parental consent provision is valid, too. A State has a keener interest in protecting minors than adults against their improvement choices.

Spousal notification. The Act adopts a spousal notification requirement in order "to further the Commonwealth's interest in promoting the integrity of the marital relationship," in "protect[ing] a spouse's interests in having children within marriage," and in "protecting the prenatal life of that spouse's child," 18 Pa. Cons. Stat. Ann. § 3209(a) (Purdon Supp. 1991). With certain exceptions, a woman must give the physician a signed statement, under penalty for making a false statement, that she has notified her spouse that she will undergo an abortion. *Ibid.*[21] This notification requirement readily survives facial challenge, because it is reasonably designed to further a number of legitimate state interests.[22]

First, spousal notification is reasonably designed to advance a State's legitimate interest in protecting the fetus.

---

[21] A woman need not provide the statement if her spouse is not the child's father; if he could not be located after a diligent search; if the pregnancy is the result of a spousal sexual assault that has been reported to the authorities; or if she has reason to believe that notifying her spouse will lead her to suffer bodily injury by him or someone else. *Id.* § 3209(b) (Purdon Supp. 1991).

[22] Pennsylvania is not alone in recognizing and protecting the husband's interest in the life of his unborn child. Before and during the 19th century, when abortion was strictly regulated and generally prohibited by state law, there was no need for special protection of the father's interests. See *Poe* v. *Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975), aff'd, 428 U.S. 901 (1976). By the time of *Roe*, some States had liberalized their abortion laws, and many of the new laws acknowledged and protected the father's role in the abortion decision. *Doe* v. *Doe*, 365 Mass. 556, 561 & nn.3-5, 314 N.E.2d 128, 131 & nn.3-5 (1974) (citing statutes of 15 States requiring husband's consent for abortions under some or all circumstances). A number of spousal consent and notification laws are currently on the books. See, *e.g.*, Colo. Rev. Stat. Ann. § 18-6-101(1) (West 1986) (spousal consent).

The husband sometimes will oppose a proposed abortion. After being notified, he may persuade his spouse to reconsider her decision, thus achieving the State's interest. Cf. Pet. App. 255a-256a.

Second, a husband's interests in procreation within marriage and in the potential life of his unborn child are unquestionably legitimate and substantial ones.[23] It can hardly be gainsaid that the State acts legitimately in seeking to protect such parental and familial interests. See *Michael H.*, 491 U.S. at 128-129 (opinion of Scalia, J.) (husband's opportunity "to develop a relationship with" the offspring of the marital community may be protected by the State) (quoting *Lehr* v. *Robertson*, 463 U.S. 248, 262 (1983)); *Labine* v. *Vincent*, 401 U.S. 532, 538 (1971). The spousal notification requirement is certainly a reasonable means of advancing that state interest. By providing that, absent unusual circumstances, a husband will know of his spouse's intent to have an abortion, the notification requirement ensures at least the possibility that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. The husband's participation, in turn, may lead his spouse to reconsider her options or to rethink a hasty decision.[24] As Judge Alito noted in dissent

---

[23] See *Danforth*, 428 U.S. at 69; *id.* at 93 (White, J., dissenting in part); *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). *Danforth* held that a State could not condition a woman's access to an abortion on the consent of her spouse, but that conclusion rested on the flawed premise that "the State cannot regulate or proscribe abortion during the first stage" of pregnancy. 428 U.S. at 69. A spousal notification requirement also impinges far less severely on a woman's ability to have an abortion than does a spousal consent requirement. See *Akron II*, 110 S. Ct. at 2979.

[24] No doubt most wives would consult with their husbands even absent a statutory notice requirement. Pet. App. 193a. Nonetheless, the Act will likely increase the number of such consultations. Many women who otherwise might choose not to tell their spouses of their decision, for reasons of convenience, haste, or concern about disagreement, will be inclined to comply because of the legislative mandate.

below, the state legislature "could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion." Pet. App. 102a.

Finally, and for essentially the same reasons, the State's interest in "promoting the integrity of the marital relationship," 18 Pa. Cons. Stat. Ann. § 3209(a) (Purdon Supp. 1991), is reasonably furthered by the spousal notice requirement. That interest is legitimate, *Akron I*, 462 U.S. at 443 n.32, and is properly encompassed by the State's traditional power to regulate marriage and strengthen family life, see *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975); *Labine*, 401 U.S. at 538. Petitioners' claim, Pet. Br. 43-44, and the district court's ruling, Pet. App. 261a-262a, that the notification requirement does not further the State's interest misses the point. The interest that Pennsylvania has chosen to foster is marital *integrity*, not "[m]arital accord," Pet. App. 262a. A State may legitimately elect to ensure truthful marital communication concerning a crucial issue such as abortion, despite the possibility that marital discord may result in some instances. See *Scheinberg* v. *Smith*, 659 F.2d 476, 484-486 & n.4 (5th Cir. 1981).

Petitioners make much of the possibility that some women may be deterred from obtaining an abortion if they must notify their spouses. Pet. Br. 41-43. But the State could reasonably have concluded that the statutory exceptions for women who reasonably fear bodily injury and for pregnancies resulting from spousal assault would eliminate the principal bases for that concern. The possibility that some women may not take advantage of the exceptions, or may fear other consequences of notification, does not affect the facial validity of the statute. See *Hodgson*, 110 S. Ct. at 2968 (opinion of Kennedy, J.) ("Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legis-

lature finds necessary to accomplish a legitimate state objective."). The State weighed the complex social and moral considerations involved and found such concerns insufficient to overcome the countervailing factors. The wisdom of such a clearly rational decision is not for the courts to judge. See *Harris* v. *McRae*, 448 U.S. at 326.[25]

Medical emergency. A "medical emergency" is an exception to the above requirements of the Act.[26] Petitioners argued below that the statutory definition of medical emergency was inadequate since it did not include three serious conditions that pregnant women can suffer (preclampsia, inevitable abortion, and prematurely ruptured membrane). The district court ruled that the definition did not include those conditions, Pet. App. 237a, but the court of appeals disagreed, Pet. App. 41a, relying on the "well-accepted canon[] of statutory interpretation used in the [state] courts," *Webster*, 492 U.S. at 515 (plural-

---

[25] Petitioners argue that the spousal notification requirement violates the Equal Protection Clause and impermissibly intrudes on "the protected marital relationship." Pet. Br. 44-48. In our view, neither claim has merit. Women who want an abortion are not a "suspect" or "quasi-suspect" class deserving of heightened scrutiny under the Equal Protection Clause. See *Harris* v. *McRae*, 448 U.S. at 323; *Maher v. Roe*, 432 U.S. at 470-471; cf. *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497 n.20 (1974). Likewise no generalized right of marital privacy is infringed by the spousal notification requirement. If the State may—indeed must, see *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981)—require the participation of both spouses in the disposition of marital property, surely it may require that they both be aware of the far more important decision to terminate a pregnancy.

[26] A "medical emergency" is defined as "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function." 18 Pa. Cons. Stat. Ann. § 3203 (Purdon Supp. 1991).

ity opinion), that a statute should be read to preserve its constitutionality and on the fact that petitioners challenged the Act on its face. Pet. App. 37a, 41a.[27]

Petitioners do not argue that the Act cannot be read that way. Instead, they criticize the Third Circuit for reading the Act too narrowly, as protecting women only from "significant" health risks. Pet. Br. 60-61. Due process, however, does not require the State to avoid placing insignificant health risks on individuals for the public benefit. This Court in *Jacobson* v. *Massachusetts* upheld a compulsory smallpox vaccination even though the vaccine had a statistical possibility of causing serious illness or death. In this case, the State has a compelling interest in protecting the fetus, which "justif[ies] substantial and ordinarily impermissible impositions on the individual," including "the infliction of some degree of risk of physical harm." *Thornburgh*, 476 U.S. at 808-809 (White, J., dissenting).

Reporting requirements. Facilities performing abortions have various reporting obligations.[28] The require-

---

[27] The State also reads the definition to include all three conditions. See Appellants C.A. Br. 5-7, 23-25. A state attorney general's interpretation of a state law is not binding on the state courts, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988), but may be useful in construing state law, cf. *Minnesota* v. *Probate Court*, 309 U.S. 270, 273-274 (1940) (relying on the state attorney general's reading of the state supreme court's opinion).

[28] Each facility must file a report with its name and address and that of any affiliated enterprise. Such information is public if a facility received state funds during the past calendar year; otherwise, the information is available only to state law enforcement officials or state medical boards. 18 Pa. Cons. Stat. Ann. § 3207 (Purdon 1983 & Supp. 1991). To "promot[e] * * * maternal health and life by adding to the sum of medical and public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child," *id.* § 3214(a) (Purdon Supp. 1991), each facility must file a report on each abortion. The reports do not identify patients by name, but they do include other types of information. *Id.* § 3214

ment that facilities provide confidential reports concerning the identities and medical judgments of physicians involved in abortions is valid given the State's legitimate interests in maternal health and enforcement of the Act. See *Thornburgh*, 476 U.S. at 804 (White, J., dissenting). The other information can be required under *Danforth*, 428 U.S. at 79-81, and furthers the same interests. See *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 486-490 (1983) (opinion of Powell, J.); *id.* at 505 (opinion of O'Connor, J.) (upholding compulsory pathology reports). Public disclosure of the number of abortions performed by facilities receiving public funds directly furthers the valid goal of increasing the public's knowledge as to how, and by whom, public money is spent. See *Wyman* v. *James*, 400 U.S. 309, 319 (1971); Pet. App. 83a.[29]

(Purdon Supp. 1991). A facility also must file a quarterly report stating the number of abortions performed for each trimester of pregnancy. Here, too, the reports are public only if the facility received state funds during the year prior to the filing of the report. *Id.* § 3214(a) (Purdon Supp. 1991).

[29] Petitioners' speculative concerns that these requirements may deter some facilities and physicians from performing abortions and may lead to harassment of abortion clinics, Pet. Br. 58, do not undermine the facial validity of the Act. The State's decision to require the reports was a rational one; the Constitution requires no more.

CONCLUSION

The judgment of the court of appeals in No. 91-744 should be affirmed and in No. 91-902 should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

THOMAS G. HUNGAR
Assistant to the Solicitor General

ALFRED R. MOLLIN
Attorney

APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45387